

UNITED STATES OF AMERICA
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Before Commissioners:

Ruth Y. Goldway, Chairman;
Mark Acton, Vice Chairman;
Nanci E. Langley; and
Robert G. Taub

Market Dominant Product Prices
Inbound Market Dominant Multi-Service Agreements
with Foreign Postal Operators 1
Canada Post Corporation–United States Postal Service
Bilateral Agreement (MC2010-35)
Negotiated Service Agreement

Docket No. R2012-5

ORDER CONCERNING RATE ADJUSTMENT
FOR BILATERAL AGREEMENT WITH CANADA POST
NEGOTIATED SERVICE AGREEMENT

(Issued December 27, 2011)

I. INTRODUCTION

The Postal Service requests approval of a Type 2 rate adjustment for the inbound portion of the Canada Post–United States Postal Service Bilateral Agreement. For the reasons discussed below, the Commission approves the request.

II. BACKGROUND

On November 23, 2011, the Postal Service filed a notice, pursuant to 39 CFR 3010.40 *et seq.* and Order No. 549, that it has entered into a bilateral agreement with Canada Post Corporation (Canada Post 2012 Agreement or Agreement), which it seeks to include in the Inbound Market Dominant Multi-Service Agreements with Foreign Postal Operators 1 product.¹ The Notice concerns the portion of a bilateral agreement with Canada Post for inbound market dominant services that the Postal Service contends is similar and functionally equivalent to agreements already included in the Inbound Market Dominant Multi-Service Agreements with Foreign Postal Operators 1 product. Notice at 1.

The Postal Service filed supporting materials, including a redacted copy of the Canada Post 2012 Agreement, supporting financial documentation, and an application for non-public treatment of materials filed under seal. The Postal Service also provided a redacted version of the Agreement and supporting financial documentation as a separate Excel file.

In Order No. 549, the Commission approved the Inbound Market Dominant Multi-Service Agreements with Foreign Postal Operators 1 product and included the Strategic Bilateral Agreement Between United States Postal Service and Koninklijke TNT Post BV and TNT Post Pakketservice Benelux BV (TNT Agreement) and the China Post Group–United States Postal Service Letter Post Bilateral Agreement (CPG Agreement) in the product. In Order No. 700, the Commission approved the functionally equivalent HongKong Post Agreement (HongKong Post Agreement).² In Order No. 871, the Commission approved the functionally equivalent China Post 2011

¹ Notice of United States Postal Service of Type 2 Rate Adjustment, and Notice of Filing Functionally Equivalent Agreement, November 23, 2011 (Notice); *see also* Docket Nos. MC2010-35, R2010-5 and R2010-6, Order Adding Inbound Market Dominant Multi-Service Agreements with Foreign Postal Operators 1 to the Market Dominant Product List and Approving Included Agreements, September 30, 2010 (Order No. 549).

² See Docket No. R2011-4, Order Approving Rate Adjustment for HongKong Post–United States Postal Service Letter Post Bilateral Agreement Negotiated Service Agreement, March 18, 2011 (Order No. 700).

Agreement.³ In Order Nos. 995 and 996, the Commission approved the functionally equivalent Singapore Post and Australia Post Agreements, respectively.⁴

Canada Post 2012 Agreement. The Postal Service and Canada Post, the postal operator for Canada, are parties to the Agreement. The Agreement covers, *inter alia*, the delivery of inbound Letter Post, in the form of letters, flats, small packets, parcels, bags, and International Registered Mail service for Letter Post. The planned inbound market dominant rates are scheduled to become effective January 7, 2012. Notice at 3. The Agreement has a term of 2 years commencing January 1, 2012 and ending December 31, 2013, although it may be extended for a third year. *Id.* Attachment 2 at 7-8; see also pdf version at 57 (2012-2013 CPC-USPS Contractual Bilateral Agreement, Exhibit 4).⁵ The Agreement however, may be terminated by either party without cause on no less than 90 days' written notice. *Id.* Attachment 2 at 8.

Requirements under part 3010. The Postal Service states that the projected financial performance of the Canada Post 2012 Agreement is provided in the Excel file included with its filing. It contends that improvements should enhance mail efficiency and other functions for Letter Post items under the Agreement. Notice at 3-4.

The Postal Service asserts that the Agreement should not cause unreasonable harm in the marketplace since it is unaware of any significant competition in this market. *Id.* at 5-6.

Data collection plan. Under 39 CFR 3010.43, the Postal Service is required to submit a data collection plan. The Postal Service indicates that it intends to report information on this Agreement through its Annual Compliance

³ See Docket No. R2011-7, Order Concerning an Additional Inbound Competitive Multi-Service Agreements with Foreign Postal Operators 1 Negotiated Service Agreement, September 23, 2011 (Order No. 871).

⁴ See Docket No. R2012-1, Order Approving Rate Adjustment for Singapore–Post United States Postal Service Letter Post Bilateral Agreement Negotiated Service Agreement, November 23, 2011 (Order No. 995); see also Docket No. R2012-2, Order Concerning an Additional Inbound Market Dominant Multi-Service Agreement with Foreign Postal Operators 1 Negotiated Service Agreement, November 23, 2011 (Order No. 996).

⁵ When the Postal Service files an executed copy of the Agreement, it should confirm the effective dates of the Agreement.

Report. While indicating its willingness to provide information on mailflows within the annual compliance review process, the Postal Service proposes that no special data collection plan be established for this Agreement. With respect to performance measurement, it requests that the Commission exempt the Canada Post 2012 Agreement from separate reporting requirements under 39 CFR 3055.3(a)(3) as determined in previous agreements approved as functionally equivalent agreements under the Inbound Market Dominant Multi-Service Agreements with Foreign Postal Operators 1 product.⁶

The Postal Service advances reasons why the instant Agreement is functionally equivalent to the previously filed CPG Agreement, TNT Agreement, HongKong Post Agreement, and China Post 2011 Agreement.⁷ It contends that it contains the same attributes and methodology and fits within the Mail Classification Schedule (MCS) language for the Inbound Multi-Service Agreements with the Foreign Postal Operators 1 product. Additionally, it states that the Canada Post 2012 Agreement includes similar terms and conditions, *e.g.*, is with a foreign postal operator, conforms to a common description, and relates to rates for Letter Post tendered from the postal operator's territory. *Id.* at 8.

The Postal Service identifies specific differences that distinguish the instant Agreement from the previous agreements. It states that the Agreement provides greater specificity in the terms and products because of the parties' business experience with their previous bilateral agreements. The Postal Service states differences include specific performance-based financial incentives and adjustments to the financial model based on the specific negotiations between the parties. *Id.* at 9-10.

⁶ In Order No. 996, the Commission held that "[f]uture agreements that fall within the parameters of the Inbound Market-Dominant Multi-Service Agreements with Foreign Postal Operators 1 product are excepted from the performance reporting requirements." Order No. 996 at 7.

⁷ The Postal Service specifically references the differences between the instant Agreement and the TNT Agreement for comparison purposes. *Id.* at 8-11.

The Postal Service contends that the instant Agreement is nonetheless functionally equivalent to existing agreements. *Id.* at 11.

In its Notice, the Postal Service maintains that certain portions of the Agreement, prices, and related financial information should remain under seal. *Id.* at 11; *id.* Attachment 1.

The Postal Service concludes that the Canada Post 2012 Agreement should be added as a functionally equivalent agreement under the Inbound Market Dominant Multi-Service Agreements with Foreign Postal Operators 1 product. *Id.* at 12.

III. COMMENTS

Comments were filed by the Public Representative.⁸ No other interested person submitted comments. The Public Representative reviews the Canada Post 2012 Agreement's functional equivalence with previously filed agreements under the Inbound Market Dominant Multi-Service Agreements with Foreign Postal Operators 1 product and its compliance with 39 U.S.C. 3622(c)(10). He maintains that the Canada Post 2012 Agreement is likely to improve the net financial position of the Postal Service or otherwise enhance the operational performance of the Postal Service during the term of the Agreement. *Id.* at 2-3.

The Public Representative maintains that the Canada Post 2012 Agreement is functionally equivalent to the previously filed agreements in the Inbound Market Dominant Multi-Service Agreements with Foreign Postal Operators 1 product. He states that his review of the Agreement and supporting financial documentation indicates that even though there are differences between the instant Agreement and the previously filed agreements these differences do not affect the basic cost or market characteristics and does not alter its functional equivalence. He states that the financial model indicates that the negotiated rates should result in an improvement over the

⁸ Public Representative Comments on Postal Service Notice Concerning Rate Adjustment for Bilateral Agreement with Canada Post and Functionally Equivalent Negotiated Service Agreement, December 14, 2011 (PR Comments).

Universal Postal System (UPU) rates. *Id.* at 4. The Public Representative also concurs with the Postal Service's conclusion that the Canada Post 2012 Agreement should support improvement in the Postal Service's operational performance during the contract period. *Id.* Finally, he maintains that the Postal Service has adequately supported its position that the Canada Post 2012 Agreement will not cause unreasonable harm to the marketplace. *Id.*

IV. COMMISSION ANALYSIS

In Order No. 549, the Commission established the Inbound Market Dominant Multi-Service Agreements with Foreign Postal Operators 1 product and two functionally equivalent agreements. In its analysis of the market dominant product in that proceeding, the Commission reviewed the statutory requirements for inclusion of negotiated service agreements under this product. As the Postal Service seeks to add another functionally equivalent agreement in the instant proceeding, there is no need to determine whether the instant Agreement should be classified as market dominant.

Statutory responsibilities. The statutory and regulatory provisions of 39 U.S.C. 3622(c)(10) and 39 CFR 3010.40(a) are applicable to the instant Agreement and require the Commission to make a finding that the proposed market dominant negotiated service agreement must either (1) improve the net financial position of the Postal Service (39 U.S.C. 3622(c)(10)(A)(i)); or (2) enhance the performance of various operational functions (39 U.S.C. 3622(c)(10)(A)(ii)). Additionally, the negotiated service agreement may not "cause unreasonable harm to the marketplace" (39 U.S.C. 3622(c)(10)(B)) and "must be available on public and reasonable terms to similarly situated mailers." 39 CFR 3010.40(c).

Financial analysis. The Postal Service states that the negotiated rates in the bilateral agreement represent an improvement over the default rates set by the UPU. Notice at 1. Based upon the financial model, the Postal Service further states that the Agreement will improve the net financial position of the Postal Service and therefore complies with section 3622(c)(10). *Id.* at 4. The Public Representative agrees that the

Canada Post 2012 Agreement negotiated rates are an improvement over the default UPU rates.

The Postal Service states that past experience with the previous bilateral agreements with Canada Post demonstrates that the Agreement will not result in unreasonable harm to the marketplace. *Id.* at 4. The Postal Service contends that there is no significant competition in this market. As a result, it believes that Canada Post is in the dominant position in the country to accept Letter Post, and the instant Agreement does not pose competitive harm in the marketplace. *Id.* at 5-6. The Postal Service states that because the Postal Service and Canada Post serve as their respective countries' designated operators to provide universal Letter Post service under the UPU Convention, there are limited alternatives for receiving inbound single-piece Letter Post. It states particularly because no other entities are subject to terminal dues rates with respect to inbound Letter Post to the United States from Canada, the market for the services subject to this Agreement is limited. *Id.* at 5. Because it is not aware of any significant competition in this market, the Postal Service expects there will be no significant impact on small business competitors. *Id.*

Based on a review of the Postal service's filing, the Commission concludes that the planned rates comport with 39 U.S.C. 3622(c)(10).

Performance and functional equivalency. The Postal Service contends that the instant Agreement is functionally equivalent to the previously filed agreements. It asserts that the instant Agreement includes similar terms and conditions, e.g., is with a foreign postal operator, conforms to a common description, and relates to rates for Letter Post tendered from the postal operator's territory with accompanying ancillary services. *Id.* at 8.⁹

The Postal Service also contends that variations between the financial models used to generate rates for the instant Agreement compared to that used to generate rates in all other agreements within the product are not relevant to the determination of

⁹ The Postal Service uses the TNT Agreement for comparison purposes. *Id.* at 9.

functional equivalency. *Id.* at 10. Further, while not identifying specific differences, the Postal Service states, “[i]n a rote comparison of any two agreements many insubstantial differences could be noted, especially when the text is not derived from the same template agreement.” *Id.*

Differences between financial models may affect functional equivalency. The Commission does not reach that conclusion in this case and will permit the instant Agreement to be included in the existing product.

As noted, for purposes of functional equivalency, the Postal Service compared the Agreement with the TNT Agreement. In future filings of this nature, it should discuss differences between the specific agreements being compared rather than resort to general statements such as that quoted above.

Request to exclude the proposed product from specific reporting requirements. The Postal Service requests an exception from the requirement to report under 39 U.S.C. 3622(c)(10) and that it instead report information in its Annual Compliance Report. The Commission finds the Postal Service’s requests to be reasonable, and the exception is granted. Additionally, it requests an exception from reporting service performance measurement under 39 CFR 3055.3(a)(3) because this negotiated service agreement can be reviewed in the measurement of existing inbound letter post flows. Order No. 996 authorizes this exception.¹⁰

Early termination. The Postal Service shall promptly notify the Commission if the Canada Post 2012 Agreement terminates earlier than the proposed term, but no later than the actual termination date. The Commission will then remove the applicable agreement from the MCS.

Conclusion. The Commission finds that the Canada Post 2012 Agreement falls within the parameters of the Inbound Market Dominant Multi-Service Agreements with Foreign Postal Operators 1 product.

¹⁰ In Docket No. R2012-2, the Postal Service requested and the Commission granted an exception to reporting requirements under 39 CFR 3055(a)(3) for functionally equivalent agreements added to the Inbound Market Dominant Multi-Service Agreements with Foreign Postal Operators 1.

V. ORDERING PARAGRAPHS

It is ordered:

1. The Canada Post 2012 Agreement filed in this docket is included within the Inbound Market Dominant Multi-Service Agreements with Foreign Postal Operators 1 (MC2010-35, R2010-5 and R2010-6) product.
2. The Postal Service shall notify the Commission of the effective and termination dates of the Canada Post 2012 Agreement as set forth in the body of this Order. If the instant Agreement terminates earlier than the proposed term, the Postal Service shall notify the Commission and file relevant contract data as set forth in the body of this Order.
3. The Postal Service request that the Canada Post 2012 Agreement be excepted from both the service performance measurement reporting pursuant to 39 U.S.C. 3055.3(a)(3) and special data collection requirements under 39 U.S.C. 3622(c)(10) and instead report information in its Annual Compliance Report is granted.
4. Within 30 days of expiration, or upon early termination of the Canada Post 2012 Agreement, the Postal Service shall file costs, volumes, and revenues data associated with the Agreement.

5. The Secretary shall arrange for the publication in the *Federal Register* of an updated product list reflecting the change made in this Order.

By the Commission.

Shoshana M. Grove
Secretary